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NO._____

In the

Supreme Court of the United States

OCTOBER TERM, 1980

THE ROMAN CATHOLIC CHURCH OF THE ARCHDIOCESE OF NEW ORLEANS: THE CONGREGATION OF ST. JULIAN EYMARD CATHOLIC CHURCH, AND BROTHERS OF THE SACRED HEART (BROTHER MARTIN HIGH SCHOOL),
Respondents,

VERSUS

STATE OF LOUISIANA, DEPARTMENT OF LABOR, OFFICE OF EMPLOYMENT SECURITY,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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PETITIONER.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

QUESTION PRESENTED

WHETHER ELEMENTARY OR SECONDARY SCHOOLS WHICH ARE OWNED AND/OR OPERATED BY CHURCHES AND/OR RELIGIOUS ORDERS OR ORGANIZATIONS ARE EXEMPT FROM COVERAGE UNDER THE FEDERAL UNEMPLOYMENT TAX ACT, AS ADOPTED BY THE LEGISLATURE OF LOUISIANA.

WILLIE D. MAYNOR, ON BEHALF OF THE LOUISIANA DEPARTMENT OF LABOR, OFFICE OF EMPLOYMENT SECURITY, PETITIONS FOR A WRIT OF CERTIORARI TO REVIEW THE LOUISIANA SUPREME COURT'S DENIAL, ON NOVEMBER 10, 1980, OF PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT, ENTERED IN THIS CASE ON JUNE 9, 1980 AND THE WRITTEN ORDER DENYING APPLICATION FOR REHEARING ENTERED ON SEPTEMBER 4, 1980.

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NO._____

In the

Supreme Court of the United States

OCTOBER TERM, 1980

THE ROMAN CATHOLIC CHURCH OF THE ARCHDIOCESE OF NEW ORLEANS: THE CONGREGATION OF ST. JULIAN EYMARD CATHOLIC CHURCH, AND BROTHERS OF THE SACRED HEART (BROTHER MARTIN HIGH SCHOOL),
Respondents,

VERSUS

STATE OF LOUISIANA, DEPARTMENT OF LABOR, OFFICE OF EMPLOYMENT SECURITY,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Willie D. Maynor, on behalf of the Louisiana Department of Labor, Office of Employment Security, petitions for a Writ of Certiorari to review the Louisiana Supreme Court's denial, on November 10, 1980, of

Petitioner's application for a Writ of Certiorari, to review the judgment of the Court of Appeal of Louisiana, First Circuit, entered in this case on June 9, 1980 and the written order denying Application for Rehearing entered on September 4, 1980.

QUESTION PRESENTED

I. Whether elementary or secondary schools which are owned and/or operated by churches and/or religious orders or organizations are exempt from coverage under the Federal Unemployment Tax Act, as adopted by the Legislature of Louisiana.

OPINIONS BELOW

The Opinion of the Court of Appeal of Louisiana, First Circuit, reported at 387 So.2d 1248 (La. App. 1 Cir., 1980), appears in the appendix (Appendix A). The Order of the Louisiana Supreme Court, denying Certiorari, not reported at this time, appears in the appendix (Appendix B). The opinion of the Administrator of the Louisiana Office of Employment Security, not reported, also appears in the appendix (Appendix C).

JURISDICTION

The First Circuit Court of Appeal of Louisiana rendered its judgment on June 9, 1980 and denied Petitioner's timely application for rehearing in its written Order on September 4, 1980. Petitioner timely applied to the Louisiana Supreme Court seeking a Writ of Certiorari to review the First Circuit Court of Appeal's decision; on November 10, 1980 the Supreme Court denied writs. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3) (1970).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides, in pertinent part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The relevant provisions of 26 U.S.C. §3309 (b) (1970), as it existed before the effective date of the Unemployment Compensation Amendments of 1976, P.L. 94-566, §115, 90 Stat. 2670, provided, in pertinent part, that covered employment did not encompass

> ". . . . service performed—
>
> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> (2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> (3) in the employ of a school which is not an institution of higher education."

The relevant Louisiana statute, West's LSA-R.S. 23:1472 (12) (F) (III), before it was amended in 1977, provided, in part, as follows:

> "III. For the purposes of subparagraphs (I) and (II) of this paragraph the term 'employment' does not apply to service performed;
>
> a. in the employ of (i) a church or convention or

association of churches, or (ii) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches; or

b. by a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

c. in the employ of a school which is not an institution of higher education; or . . .".

The Legislature of Louisiana enacted Act 745 of 1977, which inter alia, amended section 12 (F) (III) to read, in pertinent part, as follows:

III. For the purposes of Subparagraphs (i) and (ii) of this Paragraph the term 'employment' does not apply to service performed:

(a) In the employ of (i) a church or convention or association of churches, or (ii) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches;

(b) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

(c) Prior to January 1, 1978, in the employ of a school which is not an institution of higher education; after December 31, 1977, in the employ of a governmental entity referred to in Subparagraph I of this Paragraph if such service is performed by an individual in the exercise of duties: . . .".

The relevant provisions of the South Dakota stat-

utes, S.D. Compiled Laws Ann. §61-1-10.4, adopted to conform to federal law, as it existed prior to January 1, 1978 (before repeal of S.D. Compiled Laws Ann. §61-1-10.4 (3) are as follows:

"(1) In the employ of

(a) a church or convention or association of churches, or

(b) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches; or

(2) By a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(3) In the employ of a school other than a state school which is not an institution of higher education; or . . .".

PARTIES TO THE PROCEEDING AND STATEMENT UNDER RULE 28.4 (b)

All parties to the proceedings from the Louisiana Supreme Court and the Louisiana Court of Appeal for the First Circuit, from whose judgments review is sought, are included in the caption of the case before this Court, except Trinity Heights Baptist Church and St. James Episcopal Church, both of which intervened in these proceedings on the side of plaintiffs in the District Court, the court of original jurisdiction. However, the constitutionality of an Act of Congress, the Federal Unemployment Tax Act, 26 U.S.C. §3301 et seq., as applied to religiously affiliated elementary and secondary schools,

is drawn into question in this litigation and neither the United States nor any department, office, agency, officer or employee thereof is a party; therefore, 28 U.S.C. §2403(a) may be applicable.

STATEMENT OF THE CASE

A. The Federal Questions were raised in the Proceedings Below

All of the federal questions which Petitioner seeks review of, including the allegation that the 1976 Amendments to FUTA and the Louisiana statute violated rights and privileges guaranteed to plaintiffs and intervenors by the Establishment and Free Exercise Clauses of the First Amendment to the U.S. Constitution, were raised in the initial petitions or complaints filed in the court of original jurisdiction, the Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, Louisiana. The decision of the District Court, per Honorable Robert L. Roland, Judge Pro Tem, found that the deletion, by P.L. 94-566, of the school exemption language of 26 U.S.C. §3309(b)(3) and the deletion, by Louisiana Act 745 of 1977, of the school exemption language did not strip the church affiliated schools of their exemption from the unemployment compensation statutes, and, having so found, declined to decide the First Amendment issues.

The First Amendment issues were argued in Trial Court briefs filed by plaintiffs, intervenors, and defendant. Plaintiffs and intervenors re-urged their First Amendment claims in their briefs filed in the First Circuit Court of Appeal of Louisiana; defendant did not

brief the First Amendment issues in its appellate court brief because the decision was not based on those grounds.

B. Brief Statement of Facts and the Proceedings Below

Plaintiffs and intervenors own and operate private elementary and secondary parochial schools on a non-profit basis. All schools are owned and operated by religious, non-profit corporations or by churches which are operated as religious, non-profit corporations. The policies of the schools specify that they are operated as instruments for the teaching of the Christian religion and Christian values, the teaching of secular subjects being secondary to the former, which is considered a "mission" or extension of the Church.

Section 115 of P.L. 94-566, the 1976 FUTA Amendments, eliminated the school exemption language from 26 U.S.C. §3309(b) and Louisiana Act 745 of 1977 deleted the exemption from West's LSA-R.S. 23:1472 (12) (F) (III).

The U.S. Secretary of Labor construed the amended Section 3309 (b) as requiring state unemployment insurance coverage to employees of all private, non-profit elementary and secondary school establishments, including those owned and operated by churches or religious orders.

The Nineteenth Judicial District Court of Louisiana, Honorable Robert L. Roland, Judge Pro Tem, declared plaintiffs and intervenors to be exempt from coverage by the Louisiana Employment Security Law, as amended to

bring it into conformity with the FUTA counterpart, as interpreted by the U.S. Secretary of Labor.

The Court held that "There is nothing whatsoever in the legislative history of the Federal Amendment to support [the Labor Secretary's] conclusion" that coverage of religiously affiliated schools was mandated by the action of Congress in deleting the school exemption language from 26 U.S.C. §3309 (b) when it enacted P.L. 94-566. In support of its holding, the District Court quoted from the House Ways and Means Committee Report on P.L. 91-612, p. 44. The complete text of the District Court's Reasons for Judgment, unreported, appear in the appendix (Appendix D).

Approaching the case at Bar as presenting a problem characterized as "basically one of statutory construction", the District Court stated that it chose to follow the settled principle "that a statute, wherever possible, should be construed so as to avoid First Amendment constitutional questions", reiterating "that the coverage of the Louisiana Employment Security Act does not extend to the plaintiffs, and the parochial schools operated by them" and observed, gratuitously, that "had it been necessary to consider these issues, however, the Court would have been inclined to conclude, . . . , that the legislation would be unconstitutional as a violation of the establishment and free exercise clauses of the First Amendment to the United States Constitution."

The First Circuit Court of Appeal of Louisiana, quoting in part and alluding in part to the District Court's Reasons for Judgment, opined that "the trial judge was correct" and further concluded that

". . . . The fact that Subsection c has been amended

> so as to eliminate the exemption of employees of non-profit private elementary and secondary schools, cannot change the fact that, under the former law, employees of church related schools enjoyed a dual exemption. They now remain exempt." 387 So.2d 1248, 1250-1251.

Petitioner herein, in its Application for Rehearing, urged the Court of Appeal to grant an En Banc rehearing and, on the basis of "the well-reasoned opinion of the South Dakota Supreme Court [St. Martin Evangelical Lutheran Church and Northwestern Lutheran Academy vs. The State of South Dakota, 290 N.W. 2d 845 (S.D., 1980] and its failure to give proper consideration, . . . , to the intention of Congress as evidenced by the various reports of the committees of Congress, . . ." and to decide, on rehearing, "that plaintiffs and intervenors and all others similarly situated are covered employers within the intendment of both the state and federal statutes in controversy herein." The Application for Rehearing and the Order denying it appear in the appendix (Appendix E).

In its application for Writ of Certiorari filed with the Louisiana Supreme Court, petitioner herein quoted La. R.S. 23:1472 (12) (F) (III) (a, b, & c), as it was phrased before the passage of Louisiana Act 745 of 1977, and argued as follows:

> "In 1970 Congress repealed the exemption from coverage which religiously affiliated colleges and universities had enjoyed before the effective date of the 1976 Amendments to FUTA. The 1970 FUTA Amendments left intact the exemptions in favor of elementary and secondary schools which were religiously affiliated. That Congress intended to leave

the elementary and secondary religiously affiliated schools exemption intact when it passed the 1970 FUTA Amendments is best proved by the language of the following reports: House Ways and Means Committee Report 612 of the First Session of the Ninety-First Congress; House Ways and Means Committee Report 755 of the First Session of the Ninety-Fourth Congress; and Senate Report 1265 of the Second Session of the Ninety-Fourth Congress, quoted in pertinent part, supra.

"Act 745 of 1977 deleted sub-paragraph "c" above, just as P.L. 94-566 deleted the identical language from 26 U.S.C.A. §3309 (b)(3). Both the federal and state statutes were rendered unclear and ambiguous by the deletions of the precise language the phrase 'of a school', leaving for interpretation and the meaning of the phrase 'of a church . . . or an organization which is operated primarily for religious purposes . . .'. Because the term 'church' was not defined by the statutes, the threshold issue presented in any instance in which an entity is asserting an exemption is whether the employing entity is a 'church'. The same reasoning applies to the term 'religious purposes'. When it is necessary to rely on extrinsic sources to determine the meaning of terms such as 'church' and 'religious purposes' in statutes, it is incorrect, as a matter of law, to observe or hold that the statutes are free of ambiguity, thus rendering inapplicable the legislative history as an additional extrinsic source as a tool of interpretation. The Courts below had no qualms about utilizing two extrinsic sources, i.e., uncontradicted testimony of plaintiffs' and intervenors' witnesses and 'the record . . . without contradiction', as tools of interpretation to reach the conclusion that exemption contained in Section 1272 (12) (F) (III) (a) applied to church and/or religious organizations which own

and/or operate elementary and secondary schools. Nowhere in the reasoning of either Court below are the terms 'church' and 'religious purposes' defined, at least as far as this writer can perceive. Having utilized the extrinsic sources stated previously, the Courts below had a duty to also utilize Congressional Reports which were excerpted and cited in defendant-appellant-applicant's briefs and their failure and refusal to do so constitute grave enough error to warrant the issuance of a Writ of Certiorari."

Petitioner's application for Writ of Certiorari filed with the Louisiana Supreme Court appears in the appendix (Appendix F).

Petitioner herein informed the Louisiana Supreme Court, in its timely filed application for Writ of Certiorari, docketed as No. 80-c-2325, that "Northwestern Lutheran Academy and St. Martin's Evangelical Lutheran (Church) School has filed an application for Writ in the U.S. Supreme Court, . . . , docketed on July 25, 1980 as No. 80-120" and "at the time of the filing of this Application the Federal Supreme Court has not acted on the application in the South Dakota case." Appendix F, p. 17. Certiorari was granted on November 2, 1980 and petitioner herein notified the Clerk of the Supreme Court of Louisiana of that fact by letter dated and mailed on November 2, 1980. The Louisiana Supreme Court denied petitioner's application on November 10, 1980.

REASONS FOR GRANTING THE PETITION

A. The State of Louisiana has decided a federal question in conflect with a decision of the South Dakota Supreme Court, a controversy presently before this Court as No. 80-120.

The Louisiana First Circuit Court of Appeals handed down its ruling on June 9, 1980, affirming the judgment of the Nineteenth Judicial District Court which held that employees of religiously affiliated elementary and secondary schools were exempt from unemployment compensation coverage as "employees of the churches" under 26 U.S.C. §3309 (b) (1) and the Louisiana statute couched in identical language. 387 So.2d 1248, 1250. Like the District Court, the Court of Appeal declined to rule on the "constitutional questions alternatively presented by the plaintiffs." The Louisiana Supreme Court declined to grant Certiorari, thus the decision of the highest state appellate court in the case at Bar is the Court of Appeal decision.

This Court granted Certiorari on November 2, 1980, in Docket 80-120, entitled "St. Martin Evangelical Lutheran Church and Northwestern Lutheran Academy v. The State of South Dakota", reported at 290 N.W.2d 845. The text of the South Dakota Supreme Court ecision appears in the appendix (Appendix G). The Supreme Court of South Dakota held, on March 26, 1980, that: (1) Congress "apparently" intended to include elementary and secondary schools operated by churches within the unemployment compensation law when it repealed the elementary and secondary school exemption in 26 U.S.C. §3309 (b) (3) when it enacted P.L. 94-566; (2) coverage of elementary and secondary schools operated by churches does not infringe on the freedom of religion guaranteed by the Free Exercise and Establishment Clauses of the First Amendment to the United States Constitution; (3) coverage would not foster excessive entanglement even though "inclusion . . . will

necessarily call for increased involvement between the state and the school . . ."; and (4) female teachers are not exempt from coverage as members of religious orders or as ministers because "they are allowed to perform only those functions normally associated with basic education."

In *Grace Lutheran Church v. North Dakota Employment Security Bureau and North Dakota Unemployment Compensation Division*, 295 N.W.2d 767 (N.D., 1980), decided June 20, 1980 and explained in the application for Certiorari bearing Docket No. 80-120 of this Court, the North Dakota Supreme Court held that: (1) church operated schools are exempt from unemployment compensation coverage as a church under 26 U.S.C. §3309 (b) (1) and the North Dakota "mirror image" of the Federal Unemployment Tax Act; and (2) any attempt to include such schools under FUTA or the state's "mirror image" statute "raises serious questions as to excessive governmental entanglement with religion." While the Court "avoid[ed] the interpretation which creates such disharmony", it explained the various factors which would inevitably be encountered in administering the statute, were parochial schools covered by the law, and stated "this is the type of entanglement prohibited by the First Amendment to the Constitution." The *Grace Lutheran Church* decision, supra, appears in the appendix (Appendix H).

The more recent decision of the United States Court of Appeals for the Fifth Circuit, decided September 8, 1980, held that: (1) persons performing services in sectarian elementary and secondary schools "fall within the

'in the employ of' language of the statute, therefore, if the employees involved are employed by a 'church', the exemption applies to them"; and (2) "the plain meaning of 'church' requires a definition as something qualitatively greater than the physical building of worship and, at a minimum, the term encompasses the legal entity commonly referred to as a church." *State of Alabama v. Marshall and State of Nevada v. Marshall*, 626 F.2d 366, 369 (C.A. 5, 1980). The text of the *Alabama and Nevada* case appears in the appendix (Appendix I).

B. The issue of coverage of sectarian elementary and secondary schools under the Federal Unemployment Tax Act (FUTA) and its "mirror image" state statutes involve substantial federal questions.

1. The federal questions involved affect every state unemployment fund and every religious denomination.

The Federal Unemployment Tax Act, codified at 26 U.S.C. §3301-3311, is a comprehensive federal-state employment compensation system. Under this system, and related tax laws, credits against the federal tax are given to employers and grants are given to states to administer their programs only if the U.S. Secretary of Labor certifies that the state's law conforms to the federal law and that the state complies with these laws during an annual certification period. (See 26 U.S.C. §3303(a) and (b); 29 U.S.C. §49d; 42 U.S.C. §501; 26 U.S.C. §3304(c).

The controversy between churches and religious orders or organizations that operate schools and the states

began when the U.S. Secretary of Labor directed the states to include employees of sectarian schools, whether operated by churches or religious orders or organizations, within unemployment compensation law or lose their certification.

The states of Alabama, Michigan, Nevada, Tennessee, Texas, and Washington refused to extend unemployment compensation coverage to religiously affiliated schools and the U.S. Secretary of Labor informed each of the six states in 1979 that they were not in compliance with federal law and would be denied re-certification. The states of Alabama and Nevada requested and received an administrative hearing presided over by an Administrative Law Judge who, after a full evidentiary hearing and considering briefs by those states, the Department of Labor, and several interested religious groups, prepared a Recommended Decision for the Secretary of Labor to render; that Recommended Decision held the view that the 1976 Amendments to FUTA, P.L. 94-566, did not extend coverage to religiously affiliated schools but if it had done so it would be violative of the Free Exercise and Establishment Clauses of the First Amendment to the U.S. Constitution. The text of the Recommended Decision, dated October 11, 1979, appears in the appendix (Appendix J). Secretary of Labor Marshall issued his "Decision of the Secretary" on October 31, 1979, holding both Alabama and Nevada to be out of conformity with the Federal Unemployment Tax Act, as amended by P.L. 94-566; the Secretary's conclusory language is as follows:

> " . . . FUTA, as amended by the 1976 amendments, requires State unemployment compensation laws to

provide coverage for employees of non-profit church-related elementary and secondary schools. The legislative history of the pertinent statutes shows that Congress intended to cover such schools under FUTA. Settled principles of statutory construction support such coverage, particularly the rules that remedial social legislation should be liberally and broadly construed as to coverage so as to accomplish its purpose and that exemptions from such statutes should be narrowly construed. I believe that covering such schools under FUTA does not create excessive governmental entanglement with religion and is within the limits of government regulation provided by the Constitution." (Appendix K).

The complete text of the Decision of the Secretary appears in the appendix (Appendix K).

The states of Alabama and Nevada appealed the Labor Secretary's Decision of October 31, 1979 to the United States Court of Appeals for the Fifth Circuit. The Court reversed the Secretary of Labor on September 8, 1980, (626 F.2d 366 (C.A. 5, 1980)), referred to above and contained in Appendix H.

C. THE WIDESPREAD LITIGATION OF THE FEDERAL QUESTIONS INVOLVED SHOULD BE SETTLED BY THE SUPREME COURT

The question whether the 1976 Amendments to FUTA, P.L. 94-566, and the "mirror image" statutes enacted by the several states, effectively removed the exemption from unemployment compensation coverage enjoyed by religiously affiliated or church schools,

thereby imposing coverage on them, has been widely litigated, both in state and federal courts.

In addition to the conformity proceedings involving Alabama, Michigan, Nevada, Tennessee, Texas, and Washington, referred to in Part B hereof, which controversy culminated in the September 8, 1980 decision of the U.S. Court of Appeals for the Fifth Circuit, referred to in Part A hereof, there is other litigation in federal and state courts involving coverage of religiously affiliated or church schools under unemployment compensation laws.

In the consolidated cases of *Grace Brethren Church and Reverend David L. Hocking, etc., et. al. vs. State of California, etc., et. al.*, Case No. CV 79-93 MRP, and *The Lutheran Church-Missouri Synod, etc., et. al., vs. The State of California Employment Development Department, et. al.*, Case No. CV 79-162 MRP, (unreported), the U.S. District Court for the Central District of California, Pfaelzer, Judge, in granting a temporary injunction requested by two church groups which operate elementary and secondary schools, found that: (1) the church operated schools come within the 26 U.S.C. §3309(b)(1)(A) "church" exemption; and (2) the imposition and collection of the unemployment tax and administering the unemployment compensation program so as to include schools owned and/or operated by the plaintiffs resulted in "actual violation of the Religion Clauses", there being "impermissable entanglement of the state with the church, . . .". The text of Judge Pfaelzer's opinion appears in the appendix (Appendix L).

The office of Judge Pfaelzer informed petitioner herein via telephone, on January 28, 1981, that written

reasons for judgment in plaintiffs' request for a permanent injunction will be issued by the Court on or about February 15, 1981.

In *Ascension Lutheran Church, et. al. vs. Employment Security Commission of North Carolina*, Case No. C-C-79-206 (unreported), decided October 20, 1980, the United States District Court for the Western District of North Carolina, per McMillan, Judge, remanded the case to the North Carolina state court from whence it had been removed at the instance of the North Carolina Employment Security Commission for the purpose of adding the U.S. Secretary of Labor as a party defendant. Although he remanded the proceedings to state court for disposition on merits, Judge McMillan, after recounting the history of FUTA, including the 1976 Amendments made by P.L. 94-566, and the North Carolina mirror image statute, reasoned, in pertinent part, that:

> "The congressional legislative history supports Secretary Marshall's interpretation that church-related schools were to be covered by the act. *See, e.g.*, S. Rep. No. 1265, 94th Cong., 2d Sess. 8 (1976). That Senate report estimates that repeal of the exception for nonprofit schools would permit the inclusion under FUTA of 242,000 new employees, a figure which approximates the total number of teachers in *all* nonprofit elementary and secondary schools.
>
> "Though no such legislative history is available for North Carolina, it is unlikely that the state intended to deviate from the application of the federal statute. Moreover, few nonprofit schools in the state are not church-related.
>
> "Secretary Marshall in 1978 issued a letter and

later the Department of Labor issued a directive which stated that '[t]he exclusion in section 3309(b)(1)(A) relating to church employees has no other application to activities performed in elementary and secondary schools *since the schools are not churches within the meaning of that section.*' The directive stated further that the exclusion in section 3309(b)(1)(B) does 'not apply to institutions where the employees of the institution are *primarily engaged in educational activities at the elementary and secondary school level.*' U.S. Department of Labor Directive to State Employment Security Agencies, May 30, 1978 (emphasis added). Marshall reasonably maintained that Congress, by enacting the amendments, intended that FUTA should apply to all nonprofit elementary and secondary schools, including the church-related schools which comprise most of the country's nonprofit schools.

"A. *North Carolina's Employment Security Law does apply to church-related schools.*—The above history makes it obvious that the North Carolina law does require employment security contributions from church-related schools, and that they are obligated to pay the appropriate taxes. In brief recap, this conclusion is supported by (1) testimony of both Secretary Marshall and North Carolina Employment Security Commission Secretary Witmer; (2) the text of the 1970 amendments; (3) by the 1976 amendment which removed the exclusion previously in effect for nonprofit elementary and secondary schools; (4) by the North Carolina amendment to its Employment Security Law to reflect the same change, *see* N.C.G.S. §§96-8(5)q, 96-8(6)j and 96-8(6)k. 15.

"B. *Application of the statute to church-related schools does not violate the free exercise and establishment clauses of the First Amendment to the*

United States Constitution.—Defendants in applying the statute have not attempted to impede the observance of a religion or discriminate among religions, results which are necessary if a violation of the free exercise clause is to be found. *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961). Plaintiffs have not shown that requiring them to participate in the unemployment compensation program unduly burdens their right freely to exercise their beliefs. The state requires only that church-related schools submit certain records to the state and that they pay taxes to the Employment Security Commission *or* reimburse eligible former employees on an individual basis. N.C.G.S. §96-9(d). The First Amendment does not invalidate a law merely because it imposes a financial burden on a person's practice of his or her religious beliefs. *Braunfeld v. Brown, supra*, at 607. Plaintiffs here have made no showing that participation in the state's unemployment program would burden them any more than requiring their schools to make contributions to the program; requiring such contributions is hardly a burden which interferes with the practice of religious beliefs.

"Requiring participation in the unemployment compensation program does not effect excessive entanglement by the state in religious affairs nor encourage certain religious activities over others, in violation of the First Amendment's establishment clause. The state has no intent to meddle in religious affairs. It simply intends to provide a system of compensation for employees of church-related schools who lose their jobs. The unemployment compensation system affects only those schools which discharge employees, and it treats all schools equally, discriminating neither among religions nor between secular and sectarian schools. Indeed, the

only reported case in which a court reaches the merits of similar First Amendment claims holds that South Dakota's unemployment compensation statute, based on FUTA, does not create excessive government entanglement with religion. *In re Unemployment Insurance Coverage of Northwestern Lutheran Academy*, 290 N.W.2d 845 (S.D. 1980), *cert. pending*, 49 U.S.L.W. 3043 (July 25, 1980).

"Plaintiffs have not shown that North Carolina's Employment Security Law does not apply to their elementary and secondary schools, nor have they shown that the state law violates their First Amendment rights. Plaintiffs' motion for summary judgment is therefore denied, and plaintiffs are authorized to proceed to trial in state court.

"North Carolina has provided an adequate remedy in its state courts if the Employment Security Commission refuses to refund the unemployment taxes requested by three of these plaintiffs. The three plaintiffs, at least, are entitled to sue the Employment Security Commission in state superior court, pursuant to N.C.G.S. §96-10(f), as they originally did in this case.

"Although plaintiffs' claims for relief are dubious, plaintiffs deserve the opportunity to bring their action in a forum which is theoretically capable of granting the desired relief. The Tax Injunction Act would preclude this court from granting such relief, even if plaintiffs could show they had a valid claim."

The complete text of the *Ascension Lutheran Church* decision, supra, appears in the appendix (Appendix M).

The Solicitor General of the United States, in his "Memorandum for the United States as Amicus Curiae"

which urged this Court to grant Certiorari in "St. Martin Evangelical Lutheran Church and Northwestern Lutheran Academy v. The State of South Dakota", Docket No. 80-120, discussed in Part A above, stated succinctly, in part, as follows:

> "The issue in this case concerns the proper interpretation of the Federal Unemployment Tax Act . . . . and its implementation through the South Dakota Unemployment Insurance Law, . . .
>
> "The Secretary of Labor has determined that the 1976 amendments to FUTA require that the statutes of qualifying states cover parochial school employees . . . . The South Dakota Supreme Court . . . examined the legislative history of FUTA and concluded that Congress intended to remove the exemption of parochial school employees when it amended the statute in 1976. . . . Accordingly, it held that petitioners' school employees were subject to unemployment coverage. The court further held that the statute, as thus construed, does not violate the First Amendment, noting that it does not conflict with any element of petitioners' religious beliefs and practices and does not foster excessive entanglement between church and state . . .
>
> "The United States believes that the Supreme Court of South Dakota correctly interpreted FUTA to require that parochial school employees be covered by the unemployment compensation laws of qualifying states. The United States also believes that the court below was correct in upholding the constitutionality of this coverage. However, because of the importance of the questions presented in this case and because of the conflict in interpreting FUTA between the Supreme Court of South Dakota and decisions of the United States Court of Appeals for the Fifth Circuit and the Supreme

Court of North Dakota, we submit that the decision below warrants review by this Court.

" . . .

"It is important that this conflict over the interpretation of FUTA be resolved expeditiously. The entitlement of thousands of parochial school employees to unemployment compensation, . . . , turns upon the proper construction of the statute. The present controversy, however, has broader ramifications that transcend this particular group of employees. FUTA is the heart of the entire federal-state unemployment compensation system. One of the essential elements of that system is uniform application of federal laws from state to state, as embodied in the certification of state systems by the Secretary. With the present uncertainty in the proper application of FUTA, conformity determinations by the Secretary, with their attendant consequences for grants to state agencies and tax credits to employers, may vary from state to state depending upon the judicial interpretation of FUTA in effect in a particular state. Thus, the continuing litigation and conflicting results concerning FUTA's coverage pose a serious hindrance to the effective and uniform administration of the nation's unemployment system that can be resolved only by a definitive interpretation of FUTA.

"Although this case technically involves the construction of a South Dakota statute, it provides an appropriate vehicle for resolution of the FUTA controversy. The South Dakota Supreme Court made clear in its opinion that it interpreted the state statute as being intended to treat parochial schools in the same manner as did FUTA.* Thus, the case

*[This general intent is apparent from provisions of the state statute that tie its coverage to FUTA. See S.D. Codified Laws Ann. §§61-1-7, 61-1-18.1 (1978).]

involves no independent question of state law; rather, as the court below stated, the statutory question here is the "congressional intent with respect to the repeal of Section 3309(b)(3) of FUTA" (Pet. App. A-5). This case, therefore, squarely presents to this Court the question of the proper interpretation of FUTA, the federal statute. See United Air Lines v. Mahin, 410 U.S. 623, 630-631 1973; State Tax Comm'n v. Van Cott, 306 U.S. 511, 514-515 (1939)."

The complete text of the United States' Amicus brief appears in the appendix (Appendix N).

The Solicitor General of the United States filed in this Court a Petition for Certiorari to the U.S. Court of Appeals for the Fifth Circuit in the consolidated cases of *Alabama v. Marshall and Nevada v. Marshall*, 626 F.2d 366 (C.A. 5, 1980), referred to in Part A hereof. *Marshall v. Alabama*, No. 80-922 of this Court. 49 U.S. Law Week 3477 (January 6, 1981). The Court has granted Certiorari.

The decisions in *Alabama and Nevada v. Marshall*, supra, and in the case at Bar were decided on the same grounds and the identical result was reached in each case. The United States District Court for the Central District Court of California and the United States District Court for the Western District of North Carolina reached opposite results in resolving the issue whether parochial elementary and secondary schools are exempt from coverage under FUTA, as amended by P.L. 94-566 in 1976, and "mirror image" state statutes of California and North Carolina, respectively, discussed in Part C hereof. See Appendices L and M.

The significance of the federal questions involved

and the extensive litigation occurring throughout the nation warrant resolution by the United States Supreme Court.

CONCLUSION

The petition for a Writ of Certiorari to the Supreme Court of Louisiana should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for a Writ of Certiorari, together with Apendices A through N, inclusive, has been served on each of the persons named below, by depositing the same in the United States Mail, properly addressed and with sufficient postage prepaid.

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This 6th day of February, 1981 at Baton Rouge, Louisiana.

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B-7102, 2-81, 100